

ORIGINAL

INTERVENTION



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AZ CORP COMMISSION
DOCKET CONTROL

Attorneys for Defendant City of Scottsdale

BEFORE THE ARIZONA CORPORATION COMMISSION

Commissioners:

Kristen K. Mayes, Chairman

Paul Newman

Gary Pierce

Sandra D. Kennedy

Bob Stump

Docket No. T-20567A-07-0662

**APPLICATION FOR INTERVENTION
BY CITY OF SCOTTSDALE, ARIZONA**

Arizona Corporation Commission

DOCKETED

APR 10 2009

DOCKETED BY

IN THE MATTER OF THE APPLICATION
OF NEWPATH NETWORKS, LLC, FOR
APPROVAL OF A CERTIFICATE OF
CONVENIENCE AND NECESSITY TO
PROVIDE TRANSPORT AND
BACKHAUL TELECOMMUNICATIONS
SERVICES

The City of Scottsdale, an Arizona Municipal Corporation ("the City") applies to the Commission for an order pursuant to Ariz. Adm. Code § R14-3-105 allowing the City to intervene as an interested party in the above-entitled proceedings. This application is made because circumstances have become clear that the interests of the City of Scottsdale, and other cities and towns similarly situated in the State of Arizona, may be impacted by the issuance of a Certificate of Convenience and Necessity to NewPath Networks, LLC. The grounds and merits for granting this application for intervention are more thoroughly set forth in the Memorandum of Points and Authorities set forth below.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **Background Information:**

3 The proposed intervenor, City of Scottsdale ("the City"), is a municipal corporation
4 duly organized under the laws of the State of Arizona. The City has within its jurisdiction
5 various rights-of-way and public utility easements. The City regulates its rights-of-way
6 through various provisions of its municipal code including provisions relating to wireless
7 communications facilities. The City currently has roughly fifty (50) separate wireless
8 communication facilities ("WCF") within its rights-of-way that have been constructed
9 through permits issued to various commercial mobile radio service providers such as AT&T,
10 Verizon, T-Mobile, and Cricket. Each provider with a WCF in a right-of-way pays the City
11 an annual fee for use of the City's property.
12

13 On February 29, 2008, the City received notice that NewPath Networks ("NewPath")
14 was seeking to install a network of antennas within the City. NewPath describes this
15 proposed network as a "Distributed Antenna System" (DAS) consisting of individual wireless
16 nodes, a base station and interconnecting fiberoptic cables. NewPath's stated intent is to
17 place approximately 287 antennas within the City, with approximately 232 of these being
18 within the City's rights-of-way. This proposal represents an unprecedented number of WCF
19 in the City (currently there are only about 50) and the installations are proposed to cover only
20 a portion of the northern part of the City. The City has also recently received notice from a
21 competitor of NewPath, NextG Networks, that it also intends to install a DAS system
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1 consisting of multiple antennas in the downtown and northern areas of the City.¹

2 **Impact to the City's Interests:**

3 As a municipality, the City is charged with the management, maintenance and regulation
4 of its rights-of-way. This includes a responsibility to its citizens to assure that the City receives
5 fair and reasonable compensation for the use thereof. Both NewPath and NextG have asserted,
6 to varying degrees, that their possession of a CC&N from this Commission will impact and
7 limit the City's ability to require compensation for the use of its rights-of-way. According to
8 A.R.S. § 9-582, a City is restricted on charges which can be imposed upon a public service
9 corporation who is using the public rights-of-way to provide telecommunication services as
10 defined therein.
11

12
13 On August 18, 2008, NewPath's counsel forwarded to the City a letter challenging the
14 City's existing fee structure which previously has not been legally challenged by the several
15 wireless companies already using the rights-of-way. (Exhibit A, Letter from Channel Law
16 Group to John Little.) This letter references A.R.S. §§ 9-582 and - 583 as a basis for
17 invalidating the City's fee structure. NextG has also sent a letter to the City challenging the fee
18 structure. (Exhibit B, NextG letter.) NextG is even more assertive. NextG claims that its
19 possession of a CC&N from this Commission preempts City regulation and fees for its DAS
20 almost entirely.²
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22

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25 ¹ The City has been informed that the Commission has already issued a CC&N to NextG for transport and backhaul services.

26 ² Under both federal and state law, the City would be required to treat NextG and New Path on a non-discriminatory basis.

1 Unresolved Issues Relating to the Proposed CC&N

2 The City has reviewed the Commission's docket for this matter, as well as a transcript
3 from the February 18, 2009 hearing before Administrative Law Judge Kinsey. This review
4 makes clear that the interests of the City of Scottsdale and other municipalities, counties, and
5 towns in the state of Arizona are not adequately represented. The process so far has not been
6 sufficient to present a full understanding of the issues surrounding the application for a
7 statewide CC&N by NewPath. Among other things, the City does not believe that adequate
8 consideration has been given to the effect of federal preemption of the Commission's
9 jurisdiction over wireless service providers. 47 U.S.C.A. § 332(c) provides:
10
11

12 3) State preemption

13 (A) Notwithstanding sections 152(b) and 221(b) of this title, **no State or local**
14 **government shall have any authority to regulate the entry of or the rates**
15 **charged by any commercial mobile service or any private mobile service,**
16 **except that this paragraph shall not prohibit a State from regulating the**
17 **other terms and conditions of commercial mobile services.**

18 (Emphasis added.) Both NewPath and NextG have filed documents with this Commission
19 indicating that all or at least a portion of their offerings involve the provision of mobile
20 services within the meaning of the Federal Telecommunications Act. The record in these
21 proceedings does not indicate that consideration has been given to the preemptive effect
22 which § 332(c)(7) may have on the Commission's authority to issue a CC&N to a DAS
23 provider such as NewPath.

24 A second issue which does not appear to have been given adequate consideration is
25 whether or not NewPath is a "public service corporation" within the jurisdiction of the
26 Commission. A review of NewPath's application to this Commission indicates that questions

1 exist whether NewPath meets the test for a public service corporation as announced by such
2 cases as *Arizona Corporation Commission v. Nicholson*, 119 Ariz. 257, 259, 580 P.2d 718,
3 720 (1978) ("To be a public service corporation, its business and activity must be such as to
4 make its rates, charges, and methods of operations a matter of public concern. . . .").³ The
5 record indicates that no interested party has given this question thorough analysis.
6

7 **The City Should Be Granted Permission to Intervene**

8 AZ ADC R14-3-105 provides for intervention by interested persons upon an order
9 from the Commission or presiding officer. As outlined above, there are material questions
10 regarding the scope and extent to which NewPath should be granted a CC&N, if at all. Any
11 CC&N issued by this Commission to NewPath may substantially affect the interests of the
12 City of Scottsdale and other political subdivisions of the Arizona government similarly
13 situated.⁴ While an application for intervention is not the proper vehicle for the Commission
14 to make a final determine of the issues identified herein, it is clear that the issues related to
15 federal preemption and whether or not NewPath is a public service company within the
16 Commission's jurisdiction should be decided before any CC&N is issued. The interests of the
17 public and the City of Scottsdale in relation thereto are not currently being represented in
18 these proceedings. Therefore, the City respectfully requests an order from this Commission
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23 ³ In communications with the City, NewPath has indicated that it believes that a CC&N is necessary for it to sell any
24 excess capacity it may have after installation of its DAS Network. The City does not believe that such is the case and it
25 should be noted that the City does not seek to intervene in these proceedings for the purpose of preventing NewPath from
conducting business in the City or elsewhere in this state.

26 ⁴ The City is aware that NewPath has apparently conceded in these proceedings that a CC&N does not prevent the
City from regulating aesthetic issues related to its proposed wireless communication facilities. However, as noted above,
NewPath has asserted that a CC&N will impact the City's ability to regulate the use of its rights-of-way.

1 granting permission for the City to intervene in these proceedings.

2 **RESPECTFULLY SUBMITTED** this 10th day of April, 2009.

3 **SCOTTSDALE CITY ATTORNEY'S OFFICE**

4
5 By: 

6 Deborah W. Robberson, City Attorney

7 Eric C. Anderson, Assistant City Attorney

8 3939 North Drinkwater Boulevard

9 Scottsdale, Arizona 85251

Attorneys for Defendant City of Scottsdale

10 **ORIGINAL** of the foregoing filed
11 this 10th day of April, 2009 with:

12 Arizona Corporation Administrative
13 Law Judge Yvette B. Kinsey

14 **COPY** of the foregoing mailed this
15 10th day of April, 2009, to:

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17 Martha Hudek, Esq.
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1 Ernest G. Johnson, Director
2 Utilities Division
3 Arizona Corporation Commission
4 1200 West Washington Street
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6 By: 

Exhibit A

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August 18, 2008

Via Facsimile

Mr. John Little
Acting City Manager
CITY OF SCOTTSDALE
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

Dear Mr. Little:

I am writing on behalf of our client NewPath Networks, LLC ("NewPath") regarding its plans to build wireless telecommunications facilities in the City of Scottsdale ("City"). The issue concerns the City's requirement that NewPath pay \$8,000 in annual rent for use of the City's public rights-of-way for each of its 232 "nodes" in its proposed distributed antenna system ("DAS"). The rent that the City presently demands would equal \$1,856,000 per year, an exorbitant amount by any standard and an amount that grossly exceeds the limits imposed by federal law, which requires that such fees be both "fair and reasonable." 47 U.S.C. § 253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis...") As described below, it is also an amount that cannot be justified under state law. Ariz. Rev. Stat. §§ 9-582, 9-583 (2008).

The City's position signals a misunderstanding regarding the operation of NewPath's proposed DAS, a low power integrated signal transport system. A DAS is not a collection of independently functioning cell sites and should not be treated as such under the City's right-of-way licensing requirements. It also evinces a gross misunderstanding regarding potential revenues that NewPath could generate from the Scottsdale system. With a single carrier-tenant, NewPath can expect to generate about \$2,500,000 per year, placing the City's annual right-of-way ("ROW") fees at an absurd 74% of gross revenues (in fact resulting in a net loss to NewPath of over \$500,000 per year and effectively killing the project). Even if NewPath were assured of

contracting with five carriers, which is not certain, revenues would be roughly \$12.5 million and the ROW fee would still amount to 15% of gross revenues. In either case, the proposed fees cannot be characterized as "reasonable."

Finally, the City's variations on fees cannot be classified as "competitively neutral," a violation of both federal and state law. 47 U.S.C. § 253(c); A.R.S. § 9-582(B) (2008). See attached City Resolution No. 6761 setting annual fees for WiFi sites at roughly 3% of the per site fees the City would assess on NewPath (Exhibit 1).

I. Fiber-Optic Based DAS and Emerging Wireless Services

NewPath's DAS serves as the deployment platform that supports high speed voice, data, video, and Internet access services as well as coverage and capacity benefits to multiple wireless providers and public agencies via a single fiber-optic backbone. With fiber-optic cable, the DAS eliminates the need for a series of independent wireless telecommunication carrier cell sites, equipment, and power/telephone infrastructure. Because, fiber-optic cable is technology neutral, DAS can accommodate all major wireless standards and protocols for any national or regional wireless telecommunications provider that requires service within the project area. Additionally, the unlimited bandwidth inherent with fiber-optic based DAS allows local, state and federal agencies to consider extending reliable wireless telecommunications to public safety and administrative field personnel.

For example, an increasing number of law enforcement, emergency response service, and state and federal highway organizations are extending geospatial technology to the field via wireless networks for highway data collection and management purposes. These in-field applications need the support of a robust telecommunications infrastructure, like that offered by NewPath's fiber-optic based DAS. With a fiber-optic based DAS infrastructure private industry and public agencies will have the option of adopting some of the emerging wireless systems that the United States Department of Transportation recommends as part of their Advanced Rural Transportation Systems (ARTS). As you may be aware, ARTS was implemented to promote the application of Intelligent Transportation Systems (ITS) in rural areas like in order to address rural accident fatality rates. According to FHWA Highway Statistics, 1998, Rural versus Urban Highway Statistics 68.4% of all crash fatalities occur on rural highways. Even though Scottsdale is by no means rural, it may still benefit from ITS or similar technology and services. The following list includes some of the primary ITS available today:

- ***Vehicle-to-Vehicle wireless communications*** that support vehicle collision avoidance, Automatic Crash Notification ("ACN"), passing safety, and warnings about slow-moving or stopped vehicles.
- ***Roadside-to-vehicle broadcast communications*** warn drivers about safety hazards, work zones, detours, and weather conditions to name a few.
- ***Mobile wide-area wireless communications*** offer in-vehicle information systems, in-vehicle mayday function, interactive route guidance, en route warning systems, fleet

dispatching and routing, onboard information recording and reporting, electronic payment systems, onboard safety monitoring, an emergency notification.

- ***Fixed wide-area wireless communications*** permit remote roadside data collection and monitoring, roadside information displays, emergency fixed roadside terminal notification, traveler and service information access, transit demand management and interagency coordination.
- ***Short-range wireless communications*** support intersection collision-avoidance coordination, automated vehicle identification, commercial vehicle operations (e.g., electronic clearance, roadside safety inspection, weigh in motion, and automated vehicle identification), and priority signal control for transit vehicles and emergency vehicles.

The advantage that NewPath and its customers gain by installing fiber-optic cable with unlimited bandwidth reduced network deployment cost, network flexibility, and network control/scalability (*i.e.*, level of service). In addition to the benefits that fiber-optics adds to network deployment, fiber is immune to electrical interference and because it is made of glass it will not corrode, it is not affected by chemicals, it is not affected by indoor or outdoor environmental conditions, it does not pose a fire hazard, and it costs much less to maintain.

II. The City's Proposed Fees Are Not "Fair and Reasonable"

The City's requirement that NewPath pay \$8,000 per node cannot be justified under federal law. There is no correlation between that fee and either the City's administrative costs or the impact of NewPath's installation in the right-of-way.

There is general agreement among courts that local governments can charge reasonable cost-based permit fees for use of the ROW by telecommunication providers. Arizona statutory law reflects this limitation where the state code requires that "All application fees, permit fees and charges levied by a political subdivision on telecommunications corporations... shall be levied on a competitively neutral and nondiscriminatory basis and *directly related to the costs incurred* by the political subdivision in providing services..." A.R.S. § 9-582(B) (emphasis added).

Unlike cost-based fees, federal courts are split on the question of whether or not this language precludes recurring fees or limits fees to cost-based fees. The Ninth Circuit expressed concern about the relation of recurring fees to the use of the right-of-way but, to date, has declined to rule on the question of whether municipal fees for use of the right-of-way by telecommunications carriers should be cost-based. The Sixth Circuit held that § 253 authorizes municipalities to charge rent and developed a reasonableness test based on several factors. *TCG Detroit v City of Dearborn*, 206 F. 3d 618, 625 (6th Cir. 2000) ("...only the totality of the circumstances could illuminate whether a fee is fair and reasonable"). The Tenth Circuit follows a strict interpretation of the Sixth Circuit test to determine if such fees are fair and reasonable, including: (1) the extent of the use contemplated, (2) the amount other telecommunications providers would be willing to pay, and (3) the impact on the profitability of the business. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-1 (10th Cir. 2004) (concluding that costs imposed

by a local ordinance, which "would nearly quadruple [the telecommunications provider's] cost of doing business," were "sufficient to show that the [ordinance's] rental provisions are prohibitive because they create a massive increase in cost"). *Puerto Rico v. Municipality of Guayanilla*, 450 F.3d 9, 17-18 (1st Cir. 2006) (substantial decline in profit margin is sufficient basis for determining that fees are unreasonable).

In *City of Auburn v. Qwest*, 260 F.3d 1160, 1176 (9th Cir. 2001), the Ninth Circuit alluded to a cost-based fees interpretation of § 253: "Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right-of-way, as required under the Telecom Act." But when the issue arose more directly in Oregon where Qwest challenged a 7% franchise fee, the court deferred to an Oregon state court interpretation that revenue-based fees were permissible under Oregon law. Facing the same question in California, the Court moved closer to the Sixth Circuit, declining to read the language in *Auburn* as requiring all fees to be cost-based and requiring instead a case-by-case analysis. Like the Tenth Circuit, the Court used its approach to invalidate fee provisions in a proposed ordinance. *Qwest Communs., Inc. v. City of Berkeley*, 433 F.3d 1253, 1257 (9th Cir. 2006) ("we decline to read *Auburn* to mean that all non-cost based fees are automatically preempted, but rather that courts must consider the substance of the particular regulation at issue").

The Sixth Circuit used a totality of the circumstances test to determine that a 6% gross revenues rate was "reasonable":

"The court found the fee in question to be both fair and reasonable, considering the amount of use contemplated (twenty-seven miles), the amount that other providers would be willing to pay (three others had agreed to similar fees), and the fact that TCG had agreed in earlier negotiations to a fee almost identical to what it was now challenging as unfair."

F. 3d at 625. The fees that TCG challenged included a \$50,000 one-time fee and an annual fee of 4% of gross revenues. The fact that three other carriers had already agreed to the amount and that TCG itself had agreed to a similar amount previously led the Sixth Circuit to conclude that the fee was reasonable.

In the First Circuit, the Puerto Rico Telephone Company challenged a city's ten-fold increase in a license fees from 0.5% of gross revenues to 5% of gross revenues. The First Circuit's analysis of § 253(c)'s use of the phrase "fair and reasonable" is the most comprehensive of any of the circuits. The court upheld the challenge to the fee increase and looked, *inter alia*, at the impact of the fee increase on profit margin and concluded that the fee would reduce profitability by 86% on the assumption that all jurisdictions adopted the same increase. 450 F.3d at 18. It further considered the impact in the municipality itself, even if other jurisdictions did not adopt the same increase, and found the results to be comparable. Therefore, the court concluded that: "We agree with the district court that PRTC has established that Ordinance No. 40 materially inhibits or limits the ability of PRTC to compete in a fair and balanced legal and regulatory environment." *Id.* at 19. The court went further, however, to consider the question of whether fees must be limited to cost recovery alone. After considering other courts decisions not to rule on the specific question, it also declined but stated: "We agree

with the district court's reasoning that fees should be, at the very least, *related* to the actual use of rights of way..."

"Section 253(c) requires compensation to be reasonable essentially to prevent monopolistic pricing by towns. Without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates."

Id. at 22. The city offered no evidence to demonstrate that its fees were not artificially constructed and therefore not monopolistic. Rather the city argued that the fees were derived from calls that used the right-of-way, but the court refused to accept this reasoning on the grounds that there was no direct correlation between the fee and the amount of right-of-way used to make the call. *Id.* The court rejected the Sixth Circuit test factors where there was no correlation between the test factor and the carrier's use of the right-of-way. *Id.* at 23 ("The second factor (the amount that other telecommunication providers would be willing to pay) tells us more about telecommunications providers' resources and their desire to comply with local regulations than it does about why the fee chosen is 'fair and reasonable compensation' for the state or municipality").

The Tenth Circuit looked not to the impact on profitability, but rather to the relative increase in costs:

"As noted above, the proposed annual rent for a single twelve-by-eighteen foot concrete pad was \$ 6000. Qwest notes that it has 365 roadside utility cabinets that would require approximately the same amount of space. Assuming the \$ 6000 rental price is representative, *the resulting cost increase would nearly quadruple Qwest's cost of doing business* under the franchise agreement. That estimate does not account for the costs associated with surveying, obtaining the appraisal, or the rent required for other smaller Qwest facilities. Nonetheless, it is sufficient to show that the rental provisions are prohibitive *because they create a massive increase in cost.*

380 F.3d at 1270-1 (internal citations and quotes removed, emphasis added). The district court decision, *Qwest Corp. v. City of Santa Fe*, 224 F. Supp. 2d 1305, 1324-5 (D.C. N.M. 2002), provided some additional detail:

"The City does not dispute the account of the leasing of the Bishop's Lodge Road property set forth by Qwest, but notes that Qwest has refused to apply for any additional leases and that the City's revenue from the 1975 franchise agreement for the fiscal year 1999-2000 was \$ 576,166. By comparison, if the \$ 6,000 rental fee for the Bishop's Lodge Road property is multiplied by the 365 large cabinets of comparable size that Qwest has installed in the City of Santa Fe, the City would be collecting \$ 2,190,000 annually in rental fees for these large cabinets alone. In addition, Qwest could be incurring a 30% to 59% increase in costs for installation of excess-capacity conduit.

NewPath's situation is aptly described by the First and Tenth Circuit cases. With rates set artificially at a per node rate that exceeds the profit margin of that node and a substantial cost

to NewPath that is equivalent to Qwest's costs in Santa Fe, the City is precluding DAS as a means for providing telecommunications services in Scottsdale and therefore excluding NewPath from the market. On a per node basis, even factoring in NewPath's proposal to pay 5% of gross revenues as a ROW fee, the City's proposed ROW fee increases costs an astounding 132% and, moreover, wipes out any profit margin and, instead, results in a 21% loss at each site. As stated above, with a single carrier-tenant, NewPath can expect to generate about \$2,500,000 per year, placing the City's annual right-of-way ("ROW") fees at an absurd 74% of gross revenues (in fact resulting in a net loss to NewPath of over \$500,000 per year and effectively killing the project). Even if NewPath were assured of contracting with five carriers, which is not certain, revenues would be roughly \$12.5 million and the ROW fee would still amount to 15% of gross revenues. In either case, the proposed fees cannot be characterized as "reasonable." Certainly, NewPath has a compelling case that the proposed \$8,000 per node fee "materially inhibits or limits the ability of NewPath to compete in a fair and balanced legal and regulatory environment." 450 F.3d at 19.

III. The City's Proposed Fees Are Not "Competitively Neutral"

Both federal and state laws require that fees be "competitively neutral and nondiscriminatory." 47 U.S.C. § 253(c); A.R.S. § 9-582(B). As it stands, the City would impose an annual ROW fee of \$8,000 per site for NewPath, whereas it charges a WiFi provider only \$250 (FY 2008-9) for the same privilege.

WiFi is a technology that is similar to DAS in several important respects. First, it is a low power antenna transmission technology that requires multiple small sites in order to ensure coverage over a large area. DAS and WiFi also are wholly compatible. A DAS network can be a highly efficient and effective means of ensuring a broad WiFi signal. Although it is true that WiFi may not rely on fiber if line-of-sight locations are available, the fiber in DAS network can ensure ubiquitous WiFi coverage.

In addition, the City's characterization of WiFi is indistinguishable from DAS:

"It is the policy of the City of Scottsdale to set its WiFi encroachment permit fee structure to encourage full coverage for reliable WiFi service within large contiguous areas of the City." *Should be true for DAS as well.*

"A network is any combination of one or more sites that are operated by a single provider that are simultaneously available to the provider's customers. A provider may have more than one network in the city." *Similar to DAS.*

"To encourage early providers, the following alternative fees shall apply to a network's sites located within any rectangle one mile wide and two miles long if at least 12 permits are issued at a single time for sites located in the rectangle. This reduced fee shall also apply to additional sites within the rectangle and to sites within one mile of the rectangle." *Similar to DAS.*

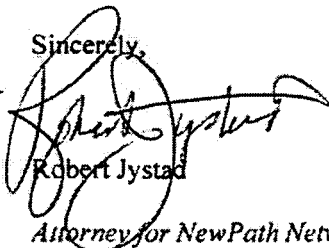
City of Scottsdale's WiFi Fee Structure FY05/06 to FY08/09 (Exhibit 1).

For these reasons, it is very difficult to see how the City can justify charging a WiFi provider \$250 or less per node, while at the same time it imposes on NewPath as much as \$8,000 per node, 32-fold increase in price without any justification for the difference. This differential is a compelling indication that the City's pricing structure is not "competitively neutral" as required by § 253(c).

In light of these decisions, it should be apparent to the City that NewPath's original proposal is a generous proposal and it is our hope that we can conclude these discussions quickly and fairly in order to finalize the process and commence construction of the network.

NewPath looks forward to discussing these issues in more detail at our next meeting. If you have any questions, please contact me at (310) 209-8515 or rjystad@channellawgroup.com.

Sincerely,



Robert Jystad

Attorney for NewPath Networks, LLC

c: Deborah Robberson, City Attorney
Michael Kavanagh
Stephen Garcia

attachment

Exhibit B



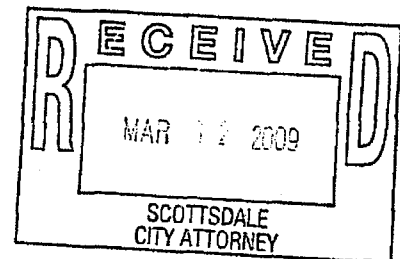
NextG Networks

8000 Research Forest Dr, #115-250 • The Woodlands, TX • 77382

cc: CITY ATTORNEY

March 10, 2009

CITY OF SCOTTSDALE
Attn: Mr. David Ellison, Assistant City Manager
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251



***RE: NextG Networks Inc., Request for License to Use the Public
ROW for the Provision of Regulated Telecommunications
Services***

Dear Mr. Ellison

Please accept this letter as the formal application of **NEXTG NETWORKS OF CALIFORNIA INC.**, a Delaware corporation *dba* **NextG Networks West** ("NextG") to deploy its fiber optic-based network facilities in the public rights of way in the City of Scottsdale. As part of this network deployment, NextG Networks is requesting an appropriate form of authorization from Scottsdale (the "City") to conduct business as a state regulated public utility providing telecommunication services with infrastructure located in public ways. This request is submitted to the City in accordance with § 253 of the federal Telecommunications Act of 1996, Section 9-583 of the Arizona State Statutes, and Chapter 47, Article VI of the City of Scottsdale Municipal Code governing the regulation of public utilities in the city rights of way. **PLEASE NOTE:** This is not a solicitation. NextG Networks is a state certified public utility seeking direction on the approval/permit process required to deploy its network facilities in the public right-of-way.

Telephone (281) 205-9185 • Fax (281) 205-9184

A. Any Necessary Approvals, License or Agreement.

NextG hereby requests authorization in the form of a license or agreement from the City of Scottsdale in order to install, operate, and maintain fiber optic cable and associated equipment, including optical repeaters and antennae, on, over, and under the public way in the City in connection with the delivery of state regulated services provided by NextG as a carrier's carrier to its wireless carrier customers. As a certificated regulated Telecommunications Company in the state of Arizona, NextG is willing to comply with the process requirement imposed on other public utilities operating in the city. If the City owns any of its streetlights or utility poles and is interested in co-location, NextG would also seek permission to attach to these facilities as well.

B. Information about NextG.

Information about NextG and its technology and services is contained in a separate document entitled "NextG Benefits to Cities" enclosed with this application letter. Additional information can be supplied to the City upon request.

C. NextG Business Model.

NextG is a fiber-based network system, providing an optical-to-radio frequency ("RF") conversion and RF transport services. NextG Networks is NOT a wireless service provider, as we do not own spectrum or sell wireless services to consumers or other third parties. However, NextG Networks' customers are the wireless carriers themselves. When an operator cannot cover an area with traditional antenna/cell sites, they often turn to NextG's service to fill this gap in coverage. NextG's services will amplify capacity and extend the carrier's RF signals in these coverage areas. NextG customers will then be able to offer improved service to their customers (consumer wireless phone user) under agreements through which NextG will construct and operate fiber-fed node networks. Although, NextG Network's equipment includes small antennae, they should not be classified as wireless communication facilities. The purpose of an antenna in our network is to interface and convert our customer's RF signal into an optical signal for transport over our fiber network.

D. Regulatory Status.

NextG is a state regulated utility, having been granted a Certificate of Convenience and Necessity ("CCN") Docket #T-20377A-05-0484 from the Arizona Corporations Commission of. This certificate classifies NextG as public service corporation providing state regulated telecommunication services. NextG's status and services are not cellular, PCS or other wireless services, which is an important distinction in how NextG is to be seen by the City.

E. Use of Poles and Streets; Trenching.

NextG Networks facilities depend on the ability to attach to existing utility infrastructure. Towards that end, NextG Networks has entered into agreements with Arizona Public Service and Qwest Communications to attach to their utility poles within their respective service areas.

As previously mentioned, if the City is interested in making any City-owned streetlight and traffic light poles (collectively "poles") available for the deployment of our network equipment, NextG would be willing to do so in lieu of installing new utility poles in areas where there are no above ground utility poles.

F. Compensation to City.

NextG will compensate the city for the use of its right-of-way use agreement consistent with the requirements of Arizona Statutes Section 9-583(B) including i.) a reasonable application fee ii.) a transaction privilege tax, and; iii.) appropriate construction/encroachment permit fees. NextG is also offering to pay Five Hundred Dollars (\$500.00) per City-owned pole utilized per annum. In addition, NextG desires to negotiate terms for the use of any City-owned fiber and/or conduit space that may be available.

As NextG is a new service type and our network design incorporates various telecommunications technologies, we expect and understand that this initial submittal will probably raise additional questions from the city. We

have found it more efficient and productive to schedule an initial meeting as a follow up to this application package and would request that be the next step. If you have any further questions, please do not hesitate to contact me at (281) 205-9185 . I look forward to hearing from you soon.

Regards,
NEXTG NETWORKS, INC.



Joe Milone
Director of Government Relations

Enclosures: - NextG Networks Certificate of Public Need and Convenience (CPCN)
 --NextG Benefits to Cities
 --NextG Press Release - Network Deployment in Del Mar, CA

CC: ~~Ms. Deborah Robberson, Esq., City Attorney, City of Scottsdale~~
 ~~Mr. Patrick Ryan, Esq. NextG Networks Outside Counsel~~

1
2 **BEFORE THE ARIZONA CORPORATION COMMISSION**

3 **COMMISSIONERS**

Arizona Corporation Commission

DOCKETED

AUG 29 2006

4 JEFF HATCH-MILLER Chairman
5 WILLIAM A. MUNDELL
6 MIKE GLEASON
7 KRISTIN K. MAYES
8 BARRY WONG

DOCKETED BY

hr

9 IN THE MATTER OF THE APPLICATION OF
10 NEXTG NETWORKS OF CALIFORNIA, INC.
11 DBA NEXTG NETWORKS WEST FOR
12 APPROVAL OF A CERTIFICATE OF
13 CONVENIENCE AND NECESSITY FOR
14 TRANSPORT AND BACKHAUL SERVICES TO
15 OTHER CARRIERS, INCLUDING BUT NOT
16 LIMITED TO WIRELESS
17 TELECOMMUNICATIONS SERVICES
18 PROVIDERS AND POTENTIALLY TO
19 WIRELESS INFORMATION SERVICES
20 PROVIDERS.

DOCKET NO. T-20377A-05-0484

DECISION NO. 68915

OPINION AND ORDER

21 DATE OF HEARING: July 27, 2006

22 PLACE OF HEARING: Phoenix, Arizona

23 ADMINISTRATIVE LAW JUDGE: Teena Wolfe

24 APPEARANCES: Thomas H. Campbell, LEWIS AND ROCA, LLP, on
25 behalf of NextG Networks of California, Inc. dba NextG
26 Networks West;

27 T. Scott Thompson, COLE, RAYWID & BRAVERMAN,
28 LLP, on behalf of NextG Networks of California, Inc. dba
NextG Networks West; and

Keith Layton, Staff Attorney, Legal Division, on behalf of the
Commission's Utilities Division Staff.

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the
Arizona Corporation Commission ("Commission") finds, concludes, and orders that:

FINDINGS OF FACT

1. On July 1, 2005, NextG Networks of California, Inc. dba NextG Networks West
("NextG" or "Applicant") filed with the Commission an application for a Certificate of Convenience

1 and Necessity ("Certificate") to provide private line and intrastate access services in order to supply
2 transport and backhaul services to other carriers, including but not limited to wireless
3 telecommunications services providers and potentially to wireless information services providers
4 within the State of Arizona.

5 2. On August 17, 2005, the Commission's Utilities Division Staff ("Staff") docketed a
6 copy of a letter informing Applicant of further information required for Staff to complete its analysis
7 of the application.
8

9 3. On October 17, 2005, Applicant docketed its responses to Staff's request for
10 additional information.

11 4. On June 6, 2006, Staff filed a Staff Report on the application, recommending approval
12 subject to certain conditions.

13 5. On June 16, 2006, a Procedural Order was issued setting the matter for hearing to take
14 place on July 27, 2006, and setting associated procedural deadlines.

15 6. On July 14, 2006, NextG filed an Affidavit of Publication demonstrating that notice of
16 the application was published in *The Arizona Republic*, a newspaper of general circulation in the
17 requested Certificate service area, on June 30, 2006. No requests for intervention were filed.
18

19 7. On July 26, 2006, Thomas H. Campbell and Michael T. Hallam filed a Motion and
20 Consent of Local Counsel for *Pro Hac Vice* Admission of Scott Thompson.

21 8. The hearing convened as scheduled on July 27, 2006. Admission *pro hac vice* was
22 granted to Scott Thompson at the commencement of the hearing. Applicant and Staff appeared
23 through counsel and presented evidence. No members of the public appeared to provide public
24 comment.
25

26 9. NextG is organized under the laws of Delaware as a C corporation, and has been
27 authorized to do business in Arizona since December 23, 2004.
28

1 10. NextG plans to offer private line and intrastate access services in order to provide
2 transport and backhaul services of voice and data signals, primarily for wireless providers. NextG's
3 "RF Transport Services" use optical technology, including multi-wavelength optical technology, over
4 dedicated transport facilities to provide telecommunications companies with more efficient transport
5 and greater overall network service options. RF Transport Services connect customer provided
6 wireless capacity equipment to customer-provided or NextG provided bi-directional RF-to-optical
7 conversion equipment at a hub facility. The hub facility can be customer or NextG provided. The
8 conversion equipment will allow NextG to accept RF traffic from the customer and then send bi-
9 directional traffic transmission across the appropriate optical networks. At the remote end, NextG or
10 the telecommunications company will provide RF-to-optical conversion equipment to allow bi-
11 directional conversion between optical signals and RF signals. RF signals can be received and
12 radiated at this remote node. NextG will offer service subject to the availability of the necessary
13 facilities and/or equipment. NextG currently has plans to operate in 27 states, and has commenced
14 operations in California, Georgia and Illinois. At the hearing, NextG's witness testified that NextG
15 plans to commence provision of service in Arizona within one year of receiving a Certificate.
16

17 11. NextG states in its application that it will rely on the financial resources of its parent
18 company, NextG Networks, Inc. The Staff Report states that the 2005 financial statements provided
19 by NextG list total assets of \$44,638,000, total equity of \$17,514,000, and net income of
20 (\$5,739,000).
21

22 12. The Staff Report states that NextG's parent and affiliates operate in 8 states and have
23 approximately 36 employees and 11 contract workers with more than 150 years of combined
24 experience in the wireless industry.
25

26 13. The application states that on March 9, 2005, the City and County of San Francisco
27 filed a complaint against NextG associated with a dispute between NextG and the City regarding
28

1 NextG's ability to construct in the public rights-of-way. Staff states in its Staff Report that on
2 January 19, 2006, Staff received a copy of a January 12, 2006 Order of the California Public Utilities
3 Commission (CPUC Decision 06-01-006) finding on behalf of NextG. Staff noted that the complaint
4 did not involve issues related to customer service, but only jurisdictional issues raised by the City.
5 NextG certified that neither the Applicant nor any of its officers, directors, partners or managers have
6 been or are currently involved in any other formal or informal complaint proceedings pending before
7 any state or federal regulatory commission, administrative agency, or law enforcement agency, or in
8 any civil or criminal investigations, and that NextG's parent and affiliates have not had an application
9 for service denied, or authority revoked, in any state.
10

11 14. Applicant has the financial, technical, and managerial capabilities to provide the
12 private line services and intrastate access services it is requesting authority to provide.

13 15. Applicant will be providing service in areas where incumbent local exchange carriers
14 ("ILECs"), along with various competitive local exchange carriers ("CLECs") and interexchange
15 carriers ("IXCs") are providing telephone and private line services.
16

17 16. Staff recommended that Applicant's proposed services be classified as competitive
18 because there are alternatives to Applicant's services; Applicant will have to convince customers to
19 purchase its services; Applicant has no ability to adversely affect the local exchange or interexchange
20 service markets; and Applicant will therefore have no market power in those local exchange or
21 interexchange service markets where alternative providers of telecommunications services exist.
22

23 17. It is appropriate to classify all of Applicant's authorized services as competitive.

24 18. NextG's proposed tariff lists a maximum rate for its proposed private line services and
25 intrastate access services. Staff reviewed NextG's proposed tariff, and states that while it lists a
26 maximum rate, NextG's proposed tariff is based on actual rates, and notes that Commission rules
27 require that the rate charged for a service may not be less than a company's total service long-run
28

1 incremental cost of providing the service. Staff states that since the services to be offered are highly
2 competitive and targeted for sophisticated carriers and communications companies experienced in
3 negotiating charges and other contract terms for point-to-point wireless voice and data services, Staff
4 believes the proposed rates are just and reasonable. Staff also notes that the majority of NextG's
5 customers are expected to purchase services under individual case basis ("ICB") arrangements and
6 pricing. Staff stated that while it considered the fair value rate base ("FVRB") information submitted
7 by the Applicant, it did not believe the information deserved substantial weight in setting Applicant's
8 rates.
9

10 19. The rates proposed by the application are for competitive services, and in general,
11 rates for competitive services are not set according to rate of return regulation. Staff obtained
12 information from the Applicant that indicates its FVRB is zero. Staff has reviewed the rates to be
13 charged by the Applicant and believes they are just and reasonable as they are comparable to those of
14 other competitive local carriers offering service in Arizona and comparable to the rates Applicant
15 charges in other jurisdictions. The rates to be ultimately charged by Applicant will be heavily
16 influenced by the market. Because of the nature of the competitive market and other factors, a FVRB
17 analysis is not necessarily representative of Applicant's operations.
18

19 20. Staff recommends that Applicant be granted a Certificate to provide the requested
20 intrastate telecommunications services subject to the condition that Applicant docket tariffs for each
21 certificated service conforming to the tariffs proposed in the application, within 365 days from the
22 date of an Order in this matter or 30 days prior to providing service, whichever comes first, and that
23 the Certificate should become null and void after due process if it does not timely comply with the
24 condition.
25

26 21. Staff further recommends the following:

- 27 (a) that Applicant be ordered to comply with all Commission rules, orders, and
28 other requirements relevant to the provision of intrastate telecommunications
services;

- (b) that Applicant be ordered to abide by the quality of service standards that were approved by the Commission for Qwest in Docket No. T-0151B-93-0183;
- (c) that Applicant be required to notify the Commission immediately upon changes to Applicant's name, address, or telephone number; and
- (d) that Applicant be ordered to cooperate with Commission investigations including, but not limited to customer complaints.

22. Staff's recommendations, as set forth herein, are reasonable.

23. Applicant's fair value rate base is determined to be zero for purposes of this proceeding.

CONCLUSIONS OF LAW

1. Applicant is a public service corporation within the meaning of Article XV of the Arizona Constitution and A.R.S. §§ 40-281 and 40-282.

2. The Commission has jurisdiction over Applicant and the subject matter of the application.

3. Notice of the application was given in accordance with the law.

4. A.R.S. § 40-282 allows a telecommunications company to file an application for a Certificate to provide competitive telecommunications services.

5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised Statutes, it is in the public interest for Applicant to provide the telecommunications services set forth in its application.

6. Applicant is a fit and proper entity to receive a Certificate authorizing it to provide private line and intrastate access services in order to supply transport and backhaul telecommunications services in Arizona as conditioned by Staff's recommendations to other carriers, including but not limited to wireless telecommunications services providers and wireless information services providers within the State of Arizona.

7. The telecommunications services that Applicant intends to provide are competitive within Arizona.

6 10. The maximum rates in Applicant's proposed tariffs are just and reasonable and should
7 be approved.

9 IT IS THEREFORE ORDERED that the application of NextG Networks of California, Inc.
0 dba NextG Networks West for a Certificate of Convenience and Necessity for authority to provide
1 private line and intrastate access services in order to supply transport and backhaul
2 telecommunications services to other carriers, including but not limited to wireless
3 telecommunications services providers and wireless information services providers, within the State
4 of Arizona shall be, and is hereby, granted, conditioned upon NextG Networks of California, Inc. dba
5 NextG Networks West's timely compliance with the following Ordering Paragraph.

IT IS FURTHER ORDERED that if NextG Networks of California, Inc. dba NextG Networks West fails to meet the timeframe outlined in the Ordering Paragraph above, the Certificate of Convenience and Necessity conditionally granted herein shall become null and void after due process.

...

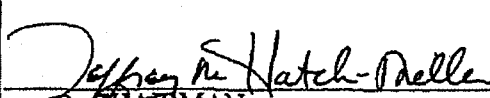
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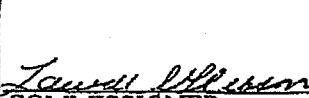
1 IT IS FURTHER ORDERED that the services NextG Networks of California, Inc. dba NextG
2 Networks West is authorized to provide herein are hereby classified as competitive.

3 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

4 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

5
6 
7 CHAIRMAN



COMMISSIONER

8
9 
10 COMMISSIONER


COMMISSIONER


COMMISSIONER

11
12 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
13 Director of the Arizona Corporation Commission, have
14 hereunto set my hand and caused the official seal of the
15 Commission to be affixed at the Capitol, in the City of Phoenix,
16 this 24th day of August, 2006.

17 
18 BRIAN C. McNEIL
19 EXECUTIVE DIRECTOR

20 DISSENT _____

21 DISSENT _____

22 TW:mj
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28



NextG Networks

Empowering Next Generation Wireless Networks:

Municipal Benefits from NextG Deployment

Wireless Industry Context

In order to accommodate customer demand for additional voice traffic (2G) and the introduction of broadband wireless data services (2.5G, 3G, WiFi [802.11b]), it is estimated that wireless operators will need to triple the number of wireless sites dedicated to expanding their networks by 2006. Developing such an ambitious wireless footprint will require creative solutions to meet coverage and capacity demands. NextG Networks is committed to providing wireless operators with a flexible fiber network architecture that delivers wireless microcell sites for deployment in areas that would be difficult or impossible to cover using traditional means.

NextG Brings Needed Solutions to Cities

In order to meet the demand of their wireless customers (many of whom have abandoned LAN-line wired telephone service), carriers must find ways to increase both the quality of their coverage and their caller traffic capacity. The high-site macrocell networks currently in place are mature and offer basic coverage, albeit with inadequate capacity. The result for many callers is the frequent inability to place a call and dropped or interrupted calls. Adding more high-site macrocells can fix coverage holes, but this traditional solution cannot address the problem that each carrier has a limited amount of spectrum to be used by its customers in the coverage area of each macrocell site.

Microcell sites at street-level offer a solution to the capacity limitations currently facing carriers by allowing the frequent re-use of carriers' existing spectrum. Because the coverage area of each microcell site is only 10-20% of the coverage shadow cast by each traditional macrocell site, the same spectrum can be re-used 5-10 times as customers move and hand off their calls among the resulting larger number of microcells handling traffic at street level instead of broadcasting from high-rise buildings. Wireless carriers know that they will have to migrate to a microcellular architecture in the near future to address the need for better coverage and increased capacity that 3G and broadband service will



NextG Networks®

NEXTG LAUNCHES DAS WIRELESS NETWORK IN LESS THAN EIGHT MONTHS

Innovative Network Enhances Wireless Performance For Ocean-Side Community

San Jose, CA- January 23, 2007 – NextG Networks, the leading provider of Distributed Antenna System (DAS) networks, announced it launched a DAS Network in Del Mar, California, which was fully operational in less than eight months. The Network enhances the wireless performance for the ocean-side community by filling in coverage gaps and increasing the capacity of the existing infrastructure.

"The NextG DAS Network is a carrier-class system that was installed and carrying traffic in record time," said Steve Casey, Cingular's executive director of network operations. "It is a significant cooperative project enabling us to provide coverage and support for our new high-speed wireless services for the residents and visitors to Del Mar."

Equally important to enhancing the mobile performance for this ocean-side community, NextG's system met the city's desire for unobtrusive network equipment with minimal impact to the environment.

"The City of Del Mar has a long-standing commitment to preserving our community's natural setting," said Del Mar City Council member Crystal Crawford, who was mayor during the development and launch of the network. "I really appreciated how NextG Networks worked with us to make the DAS Network as unobtrusive as possible. As a long-time cellular customer, I can personally attest to the improved mobile coverage."

NextG's DAS Networks use strategically placed low-power, fiber-optic-fed antenna nodes that blend very well with the surrounding landscape by using existing street lights and utility poles. The DAS Networks also are protocol-neutral, scaling easily to support multiple wireless carriers, services, and technologies.

"The challenge in cities such as Del Mar is to design and deploy a mobile communications system that is not noticed by most residents, yet supports the carriers' services for voice, instant messaging, ringtone downloads, Internet surfing and all the new services," said John Georges, CEO and co-founder of NextG Networks. "This Network can support any carrier that wants to offer service in Del Mar."

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